

**Byers Gill Solar  
EN010139**

# 8.28 Applicant's Response to ExA's Commentary on draft DCO

Planning Act 2008

APFP Regulation 5(2)(q)

Infrastructure Planning (Applications: Prescribed Forms  
and Procedure) Regulations 2009

Deadline 6 - December 2024

Revision C01



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# 1. Introduction

## 1.1. Purpose of this document

- 1.1.1. The purpose of this document is to provide the responses of RWE (the Applicant) to the Examining Authority's (the ExA) commentary on the draft Development Consent Order relating to Byers Gill Solar (the Proposed Development). That commentary has to date been provided:
- 1.1.2. Orally by the ExA and others during Issue Specific Hearing 5 on Tuesday 26 November 2024 (refer to examination library documents [EV13-001] to [EV13-006] inclusive);
- 1.1.3. In writing by the ExA in the Examining Authority's Commentary on the draft Development Consent Order (dDCO(dDCO) [PD-010] as issued on 1 November 2024, .
- 1.1.4. In providing this commentary, this document also provides a response to several matters discussed at Issue Specific Hearing 5 (ISH5) and resulting Action Points, as published on 3 December 2024.

## 2. Applicant's Response to ExA's and Others' Oral Commentary on draft DCO [EV13-001] to [EV13-006]

**Table 21 Applicant's responses to the ExA's and Others' Oral Commentary on the draft Development Consent Order [EV13-001] to [EV13-006].**

Reference / Extract of the dDCO	ExA's or Other Interested Party's Comment	Applicant's Response
<b>Article 2 (Interpretation)</b>	<p>The ExA commented on the accuracy of drafting within the draft DCO and requested for the Applicant to thoroughly review the draft DCO. The following points of detail were noted:</p> <ul style="list-style-type: none"> <li>• the introductory wording to the draft DCO incorrectly refers to a single appointed planning inspector; and</li> <li>• within part 1 of the draft DCO, the term "apparatus" is defined as having the same meaning contained within section 105 of the New Roads and Street Works Act 1991 Act ("<b>1991 Act</b>"), which the ExA considers may be too narrowly defined for the Proposed Development.</li> </ul>	<p>The Applicant has addressed both matters raised by the ExA in its revised draft DCO submitted at Deadline 6 alongside this commentary.</p> <p>In response to the ExA's general comment, the Applicant has carefully reviewed the drafting of the draft DCO and has identified a number of minor discrepancies in its drafting, chiefly amongst the definitions used in Article 2. Drafting amendments are reflected in the revised draft DCO submitted at Deadline 6 alongside this commentary. To the extent the ExA had any other specific instances in mind it would be helpful to the Applicant if they could be identified in a further written commentary on the draft DCO.</p>
<b>Article 10 (Application of the 1991 Act)</b>	Mr Casey, for Darlington Borough Council as a local highway authority, expressed concern that Article 10 of the draft DCO, and particularly Article 10(4), would remove the local high	The Applicant notes that this matter has not previously been raised by the Council. Having considered the question raised, the Applicant refers the Council to the wide controls which exist elsewhere within the draft DCO to control the manner in

	<p>authority’s controls under the 1991 Act to coordinate road works. Mr Casey explained that DBC has a wider duty under the section 16 of the Traffic Management Act 2004 to secure expeditious movement of traffic, and a duty to ensure that when schemes like the Proposed Development are delivered in an orderly fashion, whilst also considering other proposals in the area. Mr Casey submitted that Article 10(4) removes the enabling controls, which is not in the public interest.</p>	<p>which the Proposed Development is delivered in this regard. In particular, it is relevant to note that the Council would approve:</p> <ul style="list-style-type: none"> <li>• the detailed design of the Proposed Development in its capacity as relevant local planning authority under the detailed design requirement 3;</li> <li>• the construction methods to be utilised in the delivery of the Proposed Development in its capacity as relevant local planning authority under the construction environmental management plan (CEMP) requirement 4; and</li> <li>• the construction methods to be utilised in the delivery of the Proposed Development in its capacity as both relevant local planning and highway authority under the construction traffic management plan (CTMP) requirement 6.</li> </ul> <p>Given those additional controls, and the status of the project as a Nationally Significant Infrastructure Project, it is considered appropriate that certain provisions of the 1991 Act are disapplied in this way. The Council can continue to meet its duties under the Traffic Management Act 2004 through its engagement in the examination of the Proposed Development, and the controls which would be available in the draft DCO should it be made in the form sought.</p> <p>This approach has been followed in a number of made DCOs, including for example the Awel y Mor DCO.</p>
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<p><b>Article 12 (Construction and maintenance of altered streets)</b></p>	<p>The ExA questioned the wording of Article 12(1)-(3) of the draft DCO in relation to the permanent alteration of streets, which must be completed to the reasonable satisfaction of the highway authority, and unless otherwise agreed by the highway authority, which must then be maintained by and at the expense of the undertaker for a period of 12 months. The ExA noted that the objective of the 12-month maintenance period is to ensure that the highway remains in adoptable standard and for any defects to be corrected by the Applicant before passing on to the highway authority. The ExA requested an action for the Applicant to amend the drafting of Article 12 require the highway authority to inspect the highway at the end of the 12-month period to ensure the highway is in adoptable condition.</p>	<p>The Applicant acknowledges the queries raised by the ExA. In response to the ExA’s comments the Applicant has reviewed the drafting of the DCO and other made solar DCOs. It considers that the point which is being raised by the ExA is reflected in the drafting of Article 12(1) of the draft DCO for Byers Gill. The drafting of that Article is materially identical to Article 10(1) of the Mallard Pass DCO and the Cottam Solar DCO in this regard.</p> <p>In particular, the Applicant would stress that the drafting of Article 12(1) expressly requires:</p> <p style="text-align: center;"><i>The permanent alterations to each of the streets specified in Part 1 (permanent alteration of layout and maintained by the highway authority) of Schedule 4 (alteration of streets) to this Order <b>must be completed to the reasonable satisfaction of the highway authority and... it must be maintained by and at the expense of the undertaker for a period of 12 months from their completion.</b></i></p> <p>The Applicant would respectfully suggest that the drafting of this Article already addresses the mischief the subject of the ExA’s question. If the Applicant were to avoid maintaining any altered highways to adoptable standard during that 12 month maintenance period, it would be in breach of that Article (in its current form).</p>
<p><b>Article 27(5)(a) (Modification of Part 1 of the Compulsory Purchase Act 1965)</b></p>	<p>The ExA asked the Applicant to consider amending the dDCO to clarify the distinction between Part 4 (Supplementary Powers) and the reference in Article 28(5)(b) to “Part 4 –</p>	<p>The Applicant acknowledges the ExA’s comments but respectfully clarifies that the presentation of the wording in Article 28(5)(b), which is to insert additional wording into Schedule 2A of the Compulsory Purchase Act 1965, is limited</p>

	<p>Interpretation” (which is additional wording to be read into Schedule 2A of the Compulsory Purchase Act 1965).</p>	<p>by virtue of the formatting requirements of the draft DCO as a Statutory Instrument. The Applicant confirms that the presentation of the equivalent article to Article 27(5)(a) in other recently made DCOs (including the Mallard Pass DCO and the Cottam Solar Project DCO) takes the same form. The Applicant does not, therefore, propose to make any amendments to this drafting.</p>
<p><b>Schedule 1 (Authorised Development)</b></p> <p>Definition of “electrical cables”</p>	<p>The ExA clarified that throughout the description of the works within Schedule 1, the Applicant makes reference to the use of “electricity distribution and transmission cabling”, and that “transmission cabling” could be interpreted to mean something very different to “electrical cabling”, which is where the lack of clarity is present. The ExA asked the Applicant to clarify those terms.</p>	<p>The Applicant has carefully reviewed the use of the term “electrical cables” within Schedule 1 of the draft DCO and considers that it is appropriate, noting that the use of a similar definition has been made in the recently made solar DCOs by the Secretary of State, for example the Mallard Pass DCO.</p> <p>In respect of the references to “electricity distribution/transmission cabling”, the Applicant notes that those appear at the following locations in Schedule 1:</p> <ul style="list-style-type: none"> <li>• Work No.3 paragraph (h);</li> <li>• Work No.5 paragraph (d); and</li> <li>• Work No.7 paragraph (f).</li> </ul> <p>In those cases the drafting is referring to the apparatus of other statutory undertakers which may be affected by the Proposed Development, and it is therefore appropriate to describe that existing apparatus in those terms. The Applicant does not consider any further drafting change is necessary.</p>
<p><b>Schedule 1 (Authorised Development)</b></p> <p>Use of the terms “auxiliary” and “associated”.</p>	<p>The ExA noted the frequent use of catch-all terms such as “auxiliary” and “associated” within the draft DCO and requested for the Applicant to provide additional clarity, where possible.</p>	<p>The term “auxiliary” is used twice within the draft DCO. The first refers to “auxiliary” cables within the definition of “electrical cables” at paragraph 1 of Schedule 1, which is consistent with the definition used in the made Mallard Pass DCO. The second appears at sub-paragraph (b) of Work No.2</p>

		<p>in Schedule 1, where the reference is to “auxiliary transformers” in the context of the battery energy storage system. In both cases the Applicant considers the use of the term auxiliary to be appropriate and precise given the natural meaning of the word.</p> <p>The term “associated” is used in two different ways within the draft DCO. One usage is as part of the term “associated development”, which the ExA will appreciate will be read naturally with the meaning of that term in s.115 of the Planning Act 2008. The remainder of the uses of the term are consistent with its natural meaning – to be connected with something else – and the Applicant would note that its use of the term is consistent with other made DCOs both in terms of the context of each use and the overall level of use of the term (particularly with reference to other made DCOs).</p>
<p><b>Schedule 2, Requirement 3(2) (Detailed design approval)</b></p>	<p>The ExA commented that the Environmental Masterplan is certified as a separate document in the application and requested an action for the Applicant to consider to further review if any additional plans or documents are to be included in Requirement 3(2).</p>	<p>Having considered the ExA’s commentary the Applicant has added reference to the outline landscape and environmental management to the list of documents at requirement 3(2).</p>
<p><b>Schedule 2, Requirement 16 (Fencing and other means of enclosure)</b></p>	<p>The ExA queried whether the intended link between Requirement 16 and the information contained within the outline Landscape and Environmental Management Plan should be specified more clearly.</p>	<p>Drafting amendments have been made in the revised draft DCO submitted at Deadline 6 alongside this commentary to ensure that the outline landscape and environmental management plan is expressly referred to within requirement 3. That will ensure that the details to be submitted under requirement 16 reflect the information within the outline landscape and environmental management plan .</p>
<p><b>Schedule 11 (Protective Provisions)</b></p>	<p>The ExA asked the Applicant to consider whether the protective provisions included in Schedule 11 of the draft DCO contain</p>	<p>The Applicant confirms that the protective provisions included in Parts 1 to 3 of the draft DCO are in template format and substantially in accordance with the template protective</p>



	<p>protections in respect of the powers contained in Article 29 (Rights under or over streets) and Article 30 (Temporary use of land for carrying out the authorised development).</p>	<p>provisions for statutory undertakers included in other made DCOs. The Applicant considers that the template protective provisions provide adequate protections for statutory undertakers and notes that several statutory undertakers, as reported in the Statutory Undertakers Position Statement, have not objected to the draft DCO. Where statutory undertakers have specific requirements, the Applicant is in the process of negotiating bespoke protections.</p>
<p><b>Article cross-references in the Schedules</b></p>	<p>The ExA requested an Action for the Applicant to update the cross-references within Parts 1 and 2 of Schedule 5 to the draft DCO, as appropriate, to Articles 13 and 14.</p>	<p>The Applicant has carefully reviewed all articles referred to at the start of each Schedule to the draft DCO and made a number of minor cross-referencing updates, including Schedule 5.</p>

### 3. Applicant's Response to ExA's written Commentary on draft DCO [PD-010]

**Table 2-1 Applicant’s responses to the ExA’s Written Commentary on the draft Development Consent Order [PD-010]**

Extract of the dDCO / ExA’s Tracked-change	ExA’s Comment	Applicant’s Response
<p><b>Part 5 (Powers of Acquisition)</b></p> <p>The ExA’s comment applies to the title of Part 5.</p>	<p><i>Commented [A1]: Shouldn’t the Applicant include an article on Temporary Use of land for constructing the authorised development?</i></p>	<p>Article 30 (Temporary use of land for carrying out the authorised development) is included in Part 5 of the dDCO. Article 30 allows the undertaker to enter on and take temporary possession of the land identified in Article 30(1)(a) and carry out the activities set out in subparagraphs (1)(b) to (1)(f), subject to the remaining provisions of the Article.</p> <p>The Applicant refers to its responses to ExQ2 DCO.2.1 and DCO.2.5 which also relate to Article 30.</p> <p>The Applicant confirms that Article 30 provides adequate authority for the Applicant to temporarily possess land for the purpose of constructing the Proposed Development.</p>
<p><b>Article 28(5)(b) (Modification of Part 1 of the Compulsory Purchase Act)</b></p> <p><i>(5) In Schedule 2A (counter-notice requiring purchase of land not in notice to treat)—</i></p> <p><i>(a) For paragraphs 1(2) and 14(2) substitute—</i></p> <p><i>“(2) But see article 25(3) (acquisition of subsoil only) of the Byers Gill Solar Order 20[•], which excludes the acquisition of subsoil only from this Schedule”; and</i></p> <p><i>(b) after paragraph 29 insert—</i></p>	<p>No comment provided – but refer to ExA proposed tracked change in the left-hand column.</p>	<p>The Applicant clarifies that the drafting which appears following “(b) after paragraph 29 insert – “ is wording which is to be read into Schedule 2A of the Compulsory Purchase Act 1965 and, as such, the heading “PART 4 INTERPRETATION” is numbered to accord with the Parts of that Section.</p> <p>The words “PART 4 INTERPRETATION” do not indicate a new Part within the drafting of the Byers Gill Solar dDCO and as such the track-change is not appropriate. The subsequent re-numbering of Parts within the ExA’s Commentary on the dDCO are likewise unnecessary.</p>

Extract of the dDCO / ExA's Tracked-change	ExA's Comment	Applicant's Response
<p style="text-align: center;"><i>"PART 64 INTERPRETATION</i></p> <p><i>30. In this Schedule, references to entering on and taking possession of land do not include doing so under article 19 (protective works to buildings), article 30 (temporary use of land for carrying out the authorised development) or article 31 (temporary use of land for maintaining the authorised development) of the Byers Gill Solar Order 20[•]."</i></p>		
<p><b>Article 35 (Removal of Human Remains)</b></p> <p>The entirety of Article 35 is <del>deleted</del>.</p>	<p><b>Commented [A2]:</b> <i>The ExA suggests that there is no evidence of need for this article as no human remains are likely to be disturbed.</i></p>	<p>The Applicant confirms that the effect of Article 35 is to replace the existing and disparate regimes for regulating the removal of human remains and consolidate the applicable provisions in a single article in the Order.</p> <p>It is required by the Applicant to ensure that any archaeological remains are recovered appropriately without causing unacceptable delay to the implementation of the Proposed Development.</p> <p>Whilst the Applicant acknowledges that it is not currently aware of any human remains within the Order limits, this Article is appropriately included on a precautionary basis.</p> <p>As noted in the Explanatory Memorandum [CR1-015], Article 35 is substantially in the form included in several recent DCOs, also including the Cottam Solar Project Order 2024.</p>
<p><b>Article 44 (Crown Rights)</b></p> <p>The ExA's comment applies to the whole Article without track-changes.</p>	<p><b>Commented [A3]:</b> <i>Question (ExQ2) has been asked of the Applicant to Crown Land. This Art might require redrafting.</i></p>	<p>The Applicant refers to its response to ExQ2 CA.2.1. The Applicant is keeping the position in relation to the single plot 12/30 under review. In any event, this common Article would have the effect of confirming the underlying position that the Applicant could not exercise powers of compulsory acquisition against any Crown</p>

Extract of the dDCO / ExA's Tracked-change	ExA's Comment	Applicant's Response
<p><b>Paragraph 1, Schedule 1 (Authorised Development)</b></p> <p><i>“electrical cables” means—</i></p> <p><i>(a) cables of differing types and voltages installed for the purposes of conducting electricity, auxiliary cables, cables connecting to direct current (DC) boxes, earthing cables and optical fibre cables;</i></p> <p><i>(b) excavations to install trenching, including storage of excavated material;</i></p> <p><i>(c) provision of ducting or alternative means of conducting media including jointing pits hardstanding adjoining the jointing pits, combiner boxes, fibre bays, cable ducts, cable protections, joint protection, manholes, kiosks, marker posts, underground cable marker, tiles and tape, send and receive pits for horizontal directional drilling, trenching, lighting, and a put or container to capture fluids associated with drilling;</i></p>	<p><i>Commented [A4]: Unprecise wording in relation to electrical cables and also does not correspond to the wording in the “Works”. electricity distribution/transmission cabling should be defined as separate from other “electrical cables” either here or in Part 1 Preliminary.</i></p>	<p>interest without the consent of the relevant party identified within this Article.</p> <p>Limbs (a) and (c) of the definition are substantially in accordance with the definition of “electrical cabling” provided in the Mallard Pass Solar Farm Order 2024 and the Gate Burton Energy Park Order 2024. The Applicant has included limb (b) in order to make it clear that where works involving electrical cables appear in the individual Work Nos (Work No.3 and Work No.5), those excavations and storage works are also permitted.</p> <p>The Applicant considers that the definition of “electrical cables” is consistent with the wording in the Works descriptions. The drafting in the definition of the term “electrical cables” is not repeated in those descriptions, but is incorporated through this defined term. The definition is drafted in generic terms and the distinction between 33kV cables (required to connect the inverters and switchgear, and to connect the switchgears to the on-site substation) and 132kV cables (required to connect the on-site substation to the substation at Norton) is set out within the descriptions of Work No. 3 and Work No. 5. This aligns with the drafting approach taken in the recently granted solar DCOs noted above.</p> <p>The Applicant considers that definitions of “distribution cabling” or “transmission cabling” cabling are not relevant to the Proposed Development, which does not involve carrying out works to electricity distribution or transmission networks. The Proposed Development connects to the distribution network at the Norton substation, but has no direct connection to the transmission network.</p>
<p><b>Work No. 2(b), Schedule 1 (Authorised Development)</b></p>	<p>In relation to <i>“auxiliary transformers”-</i></p>	<p>The Applicant respectfully submits that separate definitions of “auxiliary transformers” and “associated bunding” are unnecessary</p>

Extract of the dDCO / ExA's Tracked-change	ExA's Comment	Applicant's Response
<p><b>Work No. 2 – a battery energy storage system comprising—</b></p> <p><i>(b) auxiliary transformers and associated bunding;</i></p>	<p><b>Commented [A5]:</b> <i>Should be defined Under Schedule 1.</i></p> <p>In relation to “associated bunding” -</p> <p><b>Commented [A6]:</b> <i>Should be defined Under Schedule 1, either separately or in conjunction with “auxiliary transformers”</i></p>	<p>and the meaning of the wording requires no further clarification for the purpose of the dDCO.</p> <p>The term “transformer” is expressly defined in paragraph 1 of Schedule 1 and “auxiliary” is included as an adjective in Work No. 2(b) only to describe the transformers in connection to the battery energy storage system, which is the summary work description.</p> <p>The term “bunding” is not expressly defined in the dDCO because it has a well-established technical meaning and “associated” is included as an adjective in Work No. 2(b) only to describe the bunding in connection with the auxiliary transformers. Express definitions of “bunding” are not included in the recently granted solar DCOs.</p> <p>Exact details of the auxiliary transformers and associated bunding will appropriately be submitted with the detailed design pursuant to Requirement 3 of the dDCO.</p>
<p><b>Work No. 2(c), Schedule 1 (Authorised Development)</b></p> <p><b>Work No. 2 – a battery energy storage system comprising—</b></p> <p><i>(c) power conversion system units including inverters, switch gear, transformers and ancillary equipment;</i></p>	<p>In relation to “ancillary equipment” -</p> <p><b>Commented [A7]:</b> <i>Should be defined Under Schedule 1.</i></p>	<p>The Applicant respectfully submits that a separate definition of “ancillary equipment” is unnecessary and the meaning of the wording requires no further clarification for the purpose of the dDCO.</p> <p>The wording is intended to capture any equipment which is ancillary – that is, necessary to support – the items listed in Work No. 2(c) being inverters, switch gear and transformers, each of which are expressly defined in the paragraph 1 of Schedule 1. Exact details of the ancillary equipment will appropriately be submitted with the detailed design pursuant to Requirement 3 of the dDCO.</p> <p>The term is also used but not expressly defined within the Mallard Pass Solar Farm Order 2024 and the Gate Burton Energy Park Order 2024.</p>

Extract of the dDCO / ExA's Tracked-change	ExA's Comment	Applicant's Response
<p><b>Work No. 3(c), Schedule 1 (Authorised Development)</b></p> <p><i>Work No. 3 – works including—</i></p> <p><i>(c) fencing, gates, boundary treatment and other means of enclosure;</i></p>	<p>In relation to <i>“other means of enclosure”</i> -</p> <p><b>Commented [A8]:</b> <i>Unprecise wording. Should be defined under Schedule 1 or Part 1 Preliminary, or reference to where these are specified (LEMP)</i></p>	<p>The Applicant respectfully submits that a separate definition of “other means of enclosure” is unnecessary and the meaning of the wording requires no further clarification for the purpose of the dDCO.</p> <p>The Applicant confirms that Requirement 16 (Fencing and other means of enclosure) of the dDCO will require the Applicant to submit for approval by the relevant planning authority written details of all proposed permanent and temporary fences, walls or other means of enclosure for each phase of the Proposed Development.</p> <p>The Applicant notes that “other means of enclosure” is included in the drafting of the recently granted solar DCOs without express definition.</p> <p>The Applicant submits that Requirement 16 provides adequate control over the final details of any “other means of enclosure”.</p>
<p><b>Requirement 13(2) (Implementation and maintenance of landscaping), Part 1, Schedule 2 (Requirements)</b></p> <p><i>(2) Any tree or shrub planted or used as part of an approved landscaping management scheme that, within a period of five years after planting, is removed, dies or becomes, in the opinion of the relevant planning authority, seriously damaged or diseased must be replaced in the first available planting season with a specimen of the same species and size as that originally planted.</i></p>	<p>No comment provided.</p>	<p>The Applicant refers to its response to ISH4-01 in the Response to Hearing Action Points (Document Reference 8.20) submitted at Deadline 5. Requirement 13(1) requires that “all landscaping works must be carried out in accordance with the LEMP approved under requirement 12 (landscape and ecological management plan)”. The Outline LEMP (Document Reference 6.4.2.14, Revision 2) has been updated at paragraph 8.2.3 to more explicitly commit to replacing any existing planting, relied upon for mitigation, that is damaged, diseased or removed/dead within 5 years of operation. On that basis, the Applicant respectfully submits that no amendment of Requirement 13(2) is necessary.</p>